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January 16, 2003

Ms. Marlene Dortch Secretary Federal Communications Commission 445 12<sup>th</sup> Street, SW, Room TWB-204 Washington, DC 20554

Re: Notice of Written Ex Parte Communication, In the Matter of Review of the

Section 251 Unbundling Obligations of Incumbent Local Exchange

Carriers, CC Docket Nos. 01-338, 96-98 and 98-147

Dear Ms. Dortch:

AT&T's ex parte letter dated December 23, 2002 ("December 23 ex parte") demonstrates that the Commission should reject the RBOCs' pleas to retain the existing interim restrictions on the use of loop-transport combinations to provide functionalities that are currently available through the purchase of special access services. However, to the extent that the Commission determines that some form of limitation on the use of UNE combinations -- although not individual UNEs – would be appropriate, AT&T offers the attached rule, which is consistent with all of the goals of the 1996 Act, including the promotion of competition in all telecommunications markets and the encouragement of alternative facilities construction.

As demonstrated in the December 23 letter, the anticompetitive market effects of the existing restrictions are increasing daily, as the RBOCs obtain section 271 relief and enter the interexchange market. Thus, if the Commission should determine that some form of restrictions may be continued for existing facilities that are not used either to provide local service or to expand a competing carrier's own network, those restrictions should be transitional only, and should be narrowly drawn and designed to promote both interexchange competition and competitive carriers' incentives to construct alternative facilities where it is economically and practically feasible to do so. The discussion below explains the rationale for each portion of the attached rule.

Section 1 – Application of the rule – This introductory section makes clear that the provisions of this rule will apply whenever a requesting carrier is authorized to purchase

loops, transport and related functionalities as unbundled network elements. However, it does not independently establish the circumstances pursuant to which requesting carriers are entitled to purchase specific UNEs. Rather, such determinations would be made pursuant to the rules applicable to those particular elements.<sup>1</sup>

Section 2 - Commingling restrictions prohibited - The record clearly shows that there is no technical or other reasonable basis to continue to impose a commingling limitation on loop-transport combinations. As the Supreme Court held in *Verizon*, the Act and the Commission's implementing regulations require all carriers to operate efficiently. Yet commingling restrictions inherently force requesting carriers -- but not incumbents -- arbitrarily to divide up their traffic into "local" and "non-local" segments and carry them on separate facilities. Not only is this patently discriminatory, it also forces requesting carriers to operate inefficiently and in a manner that no network engineer would use to design a network.

Moreover, when ordering "backhaul" infrastructure facilities, including node-to-node transport, associated DS1/DS3 multiplexing and interconnection facilities, requesting carriers typically order facilities that are not immediately placed in service, in order to both minimize provisioning costs and to have ready backhaul capacity to serve customer demand. Accordingly, such facilities are not identified for specific customers and carry no traffic. Thus, it is not even possible to tell which of them would be used to provide any particular type of traffic. Accordingly, any attempt to isolate "UNEs" to "local" traffic and "services (or elements that are not UNEs)" to "non-local" traffic would be impossible.

Finally, to the extent that the Commission adopts rules that allow some loop or transport UNEs to be removed from availability in some circumstances, it will become increasingly irrational to differentiate between "UNE" traffic and "non-UNE" traffic. Accordingly, all commingling restrictions must be removed.

Section 3 – No use restrictions on newly ordered combinations – The Supreme Court has eliminated all debate as to whether incumbents are required to provide access to "new" combinations of UNEs, particularly when they are used in the same manner that existing combinations are used. <sup>4</sup> Moreover, there is no reasonable concern at all about the possible economic impacts on the ILECs from allowing new loop-transport combinations to be used to provide special access services. Thus, the Commission should make clear

<sup>&</sup>lt;sup>1</sup> See AT&T ex parte letters from Joan Marsh dated November 25, 2002 (describing the economic circumstances in which a requesting carrier may be able to consider constructing its own facilities) and December 18, 2002 (submitting proposed rules for loop and transport availability as unbundled elements).

<sup>&</sup>lt;sup>2</sup> Verizon Communications v. FCC, 122 S.Ct. at 1673, 1676 n.33.

<sup>&</sup>lt;sup>3</sup> See December 23 ex parte at 8; AT&T Reply Comments at 292-294.

<sup>&</sup>lt;sup>4</sup> Verizon, 122 S.Ct. at 1683-87.

that there will be no use restrictions permitted on newly ordered combinations of loops and transport, including associated multiplexing.

*Section 4 – No use restrictions on standalone network elements; immediate* conversion of such elements permitted – The Commission made clear in the UNE Remand Order that its decision on use restrictions did not affect a requesting carrier's right to use an individual UNE facility (and associated multiplexing) to provide exchange access services. That portion of the Commission's decision was not affected by, or even referenced in, the USTA decision. Accordingly, this result is already required under the Commission's rules. Moreover, barring such restrictions also encourages requesting carriers to build out their own networks, since no single UNE standing by itself can be used to provide telecommunications services. If those carriers are allowed to purchase individual loop or transport UNEs, it becomes easier for them to make a decision to invest in other connecting facilities that would not otherwise be economically justifiable.<sup>5</sup> Accordingly, the Commission should make clear that a requesting carrier may use such a standalone element, purchased at TELRIC rates, to provide any telecommunications service. Moreover, since the commingling restrictions and other administrative issues have often made it difficult or impossible for carriers such as AT&T to purchase even individual network elements as UNEs, the rule should make clear that any standalone loop or transport network element (and associated multiplexing) that is purchased as a special access arrangement may be immediately converted to a UNE.<sup>6</sup>

Section 5 –Immediate conversions to element combinations permitted - This section identifies specific situations in which incumbents would not be permitted to refuse requesting carriers' orders to convert existing special access arrangements to UNE combinations. Notably, this proposed rule would *not* permit immediate conversion of any UNE combination exclusively used to connect an end user customer directly with an IXC's point of presence for long distance services. This represents a very substantial portion of AT&T's current purchases of special access services. Each of the individual situations in which the proposed rule would permit special access arrangements to be converted to UNE combinations is discussed separately below.

(a) Combinations that terminate on a requesting carrier's serving office, node, collocation or other location except an IXC point of presence – When a carrier builds facilities, regardless of whether it is an incumbent or a competitor, it does not build

<sup>&</sup>lt;sup>5</sup> AT&T Reply Comments at 294-95. For example, it might in some cases be economically justifiable for a competitor to build a transport facility if it could obtain access to connecting loop functionalities as UNEs, but not if those facilities could only be purchased at much higher special access rates.

<sup>&</sup>lt;sup>6</sup> In this context, it should be noted that in some cases State commissions have not determined TELRIC rates for UNE DS1 or DS3 facilities. Thus, requesting carriers' ability to convert special access arrangements, either to standalone UNEs or to UNE combinations, will be impeded until such rates have been established. Accordingly, the Commission's order here should encourage States to act promptly to establish appropriate TELRIC-based rates.

separate "local" and "non-local" facilities, because doing so would necessarily suboptimize the carrier's ability to use its own plant. Thus, competitive carriers would face discriminatory inefficiencies and costs if they were forced to build separate networks to handle local and non-local traffic.

In addition, one of the Commission's oft-stated goals has been to provide incentives for requesting carriers to construct their own facilities. Carriers would receive such incentives if they were assured that they could use combinations of UNEs to replace high-priced special access services that connect to facilities that they have constructed themselves or obtained from non-ILEC providers that have constructed alternative facilities. As shown in connection with the discussion of section 2, this will make it easier for carriers to decide to build alternative facilities on routes where there is enough traffic to support them, without also having to build facilities to connect points that do not have sufficient traffic to support such construction. And supporting such additional construction will also promote additional diversity in routing and further the goal of providing additional network stability.

This portion of the proposed rule should stimulate facilities-based investment generally by encouraging all competitive carriers to build out their local access networks where it is not possible to build facilities all the way to a customer using only the competitor's owned facilities. Thereafter, as volumes and usage increase for all types of traffic, the carrier can gradually invest in additional facilities to replace the ILEC-owned facilities, similar to the manner in which facilities-based competition arose in the long distance industry.

Under this provision, a competitive carrier would immediately be able to convert to UNE combinations special access arrangements that terminate at some form of carrier node, which could be located in a collocation, another type of external node or in the serving office where its local switch is housed. In any of these cases, however, in order to qualify for conversion under this provision, the network side terminus of the combination could not be an IXC's point of presence, as defined by the 11-character CLLI code that references an IXC's switch. Thus, any combination of network facilities that is entirely ILEC-provided between the customer and the requesting carrier's interexchange switch would have to be purchased as a special access service, unless the facility qualified under another provision of the proposed rule. In AT&T's case, this would exclude about 75% of its current \$3 billion annual special access expense, i.e., 75% would not be eligible for immediate conversion to UNEs..

(b) Combinations used to originate or terminate traffic on a non-circuit switch or a switch that delivers Class 5 functionality and is not primarily used for class 4 or higher functionality –There cannot be any legitimate concern that facilities routed to a Class 5 or other switch that is not primarily used for class 4 or higher (toll) functionality will not be used to handle a significant amount of local traffic. Indeed, as shown by WorldCom and

 $<sup>^{7}</sup>$  E.g., Nortel DMS switches, or any other switch that is not used primarily for the purpose of carrying toll traffic.

AT&T in support of WorldCom's petition for waiver of the safe harbor rules, <sup>8</sup> it would be pointless and prohibitively expensive for a carrier to route calls to such a switch, and thus incur not only the substantial costs of that switch but also the costs of re-trunking to a POP, just to avoid special access charges. However, the safe harbor rules have made it impossible for carriers such as AT&T to comply with their specific circuit-by-circuit tracking requirements. <sup>9</sup> Thus, the safe harbors themselves are raising competitors' costs even when the competitors in fact provide significant amounts of local service. Accordingly, even if some form of "local" requirement on conversion of existing special access arrangements were justified, the safe harbor rules have been significantly counterproductive, and a different type of approach should be employed to separate out circumstances where there is significant local traffic on carriers' facilities. A limitation that is based on the type of switch used at the network terminus of a facility is thus a logical and practical way of implementing such a requirement.

In addition, it is still the case that voice services for all customers are overwhelmingly provided over switches that employ circuit-based technology. If the Commission seeks to expand the competitive deployment of switches that provide advanced capabilities, it should also prohibit incumbents' from raising their competitors' costs for using such switches and allow them to use loop-transport UNE combinations to provide service from such switches.

(c) Combinations used to originate or terminate traffic on a switch not identified in (b) above if the requesting carrier certifies (i) that the switch has been configured to provide local service and (ii) that the facility is used to provide local service duly authorized by state law – Even to the extent that the Commission believes that it would be appropriate, for a limited period of time, to provide some "local" limitation on carriers' ability to convert special access arrangements, the record evidence of network architectural and engineering, operational and marketing data all demonstrate that a "structural" limitation makes significantly more sense than one that is based on some arbitrary percentage of "local" usage.

First, as shown above and in the December 23 *ex parte*, efficient carriers seek to engineer facilities to handle *all* of the traffic they expect to carry between two points, and often it is not even possible to tell at the time they are ordered whether (and to what extent) they will be transporting "local" or "non-local" traffic. Thus, a usage-based requirement makes it effectively impossible for the carrier to know, at the time it must make its network construction decisions, what its costs will be. Second, as AT&T has also explained in detail, <sup>10</sup> IXC systems are simply unable to determine, especially on a circuit-by-circuit

<sup>&</sup>lt;sup>8</sup> WorldCom Petition for a Waiver, CC Docket No. 96-98, filed September 12, 2000; AT&T Reply in Support of WorldCom's Petition, filed October 10, 2000 at 5.

<sup>&</sup>lt;sup>9</sup> See, e.g., Comments of AT&T Corp. on Use of Unbundled Network Elements to Provide Exchange Access Services, CC Docket No. 96-98 (Apr. 5, 2001), Carroll-Rhoades Declaration.

<sup>&</sup>lt;sup>10</sup> *Id*.

level, how much traffic on a facility is local and how much is not. Indeed, in AT&T's experience under the current restrictions, it has not been able to convert a *single* loop-transport special access arrangement to UNEs. Moreover, even if a carrier were able to certify that facilities will be used to provide specific amounts of local service, it is still subject to intrusive and costly audits from the incumbents.

Further, it is nearly impossible to get customers to certify what their usage will be on particular facilities, <sup>11</sup> and any rule requiring a competitive carrier to base its right to purchase UNEs on customer representations would in all events be discriminatory and anticompetitive. ILECs are not required to interfere with their customer relations in order to obtain similar certifications so that they can provide facilities to themselves at cost. <sup>12</sup> Thus, effectively imposing a customer certification requirement on CLECs creates a regulatory distinction that imposes a further competitive barrier on CLECs by forcing them to make a difficult choice between (1) paying inflated, discriminatory prices for their network (that would also support higher ILEC retail rates) or (2) interfering with their marketing and customer relationships by requiring customers to certify for the CLEC something they have never been asked to certify for the ILEC. As a result, any use restriction limited to some specified *amount* of "local" traffic will be difficult if not impossible to comply with, and will assuredly bar carriers from access to UNEs, even when they are in fact used to provide a significant amount of local service.

A far more fair, and easy to administer, test would be based on the existence of some objective indication that the requesting carrier has made some investment in facilities to provide local services, and is in fact using those facilities to provide services that are clearly "local." Therefore, to the extent that the Commission would apply any limited "local" restrictions on a carrier's ability to convert existing special access arrangements to UNEs, it should be sufficient that the carrier certify that the switch where the arrangement terminates is configured to provide local service and that the facility is used to provide "local services" duly authorized under state law (e.g., offered pursuant to tariff properly filed with the state commission and in effect). Such a requirement would be procompetitive, because it would promote the deployment and use of competitive local switching capacity. Second, because it can be determined in advance based on information in the requesting carrier's own records, it would be simple to administer and would not allow incumbents to continue to play anticompetitive games with the auditing process.

 $<sup>^{11}</sup>Id$ . ¶ 17. It will be equally difficult and intrusive for a competitive carrier to obtain a customer's certification that the CLEC is the "exclusive provider" of the customer's local exchange service. Aside from the fact that business customers are increasingly demanding redundancy in their telecommunications services suppliers, many customers may simply consider it not to be any of the CLEC's business whether they are using other providers if such information does not affect the terms and conditions of service.

<sup>&</sup>lt;sup>12</sup> Even if the ILECs were required to provide facilities to themselves at special access prices, the incumbents would simply be facing a "left pocket/right pocket" transfer, while competitors would face a true competitive cost disadvantage.

(d) Combinations used to offer telecommunications services or as an input into advanced services that are not primarily reliant on the public switched network and that provides connections between two or more locations within the same LATA - This provision would prohibit incumbents from imposing use restrictions on facilities used to provide local private line and data services. It is inherently impossible to measure the types of traffic carried over non-switched facilities that connect two or more locations within a LATA. Indeed, any test of "local" usage inherently presumes that the traffic over the identified facilities will be used to provide switched services, since it is only at a switch that such determinations can be made (if they can be made at all). It is a virtual certainty, however, that facilities used to provide non-switched services between two points in a LATA are used to provide significant amounts of "local" voice or data traffic. Indeed, if they did not, they would serve no purpose, and there is certainly no basis to apply use restrictions on facilities used to support local data services, which are typically provided without the need for switching. Moreover, any such restrictions would only deter competitors' plans to expand Internet and data networks and to deploy innovative services such as VOIP.

(e) If the ILEC offers an access facility to retail customers in a configuration or at a price that is otherwise not available to a requesting carrier on a standalone basis at no less favorable terms, conditions and prices — This requirement is necessary to provide requesting carriers the ability to compete with ILECs that have obtained special access pricing flexibility, in order to assure that the incumbents cannot use such authority to create price squeezes. In such cases, the ILEC is able to offer a unique price to a specific retail customer without having to lower its prices generally. As a result, the ILEC enjoys a substantial economic advantage and can price the service down at least to its TERLIC cost, if not to its even lower short run marginal cost while leaving the wholesale market alternative unaffected. If requesting carriers cannot obtain access to the same facilities as the ILEC at TELRIC costs, they will be artificially disadvantaged in their attempts to win such customers' business.

Section 6 — Limited restrictions on conversions of special access arrangements permitted – There is no basis to make any use restrictions permanent, especially as incumbent LECs increasingly enter the interexchange market and offer to serve enterprise customers at retail with the same facilities that competitors need at wholesale to serve those same customers. When an incumbent is able to provide both local and long distance services throughout a State, it theoretically is supposed to operate without any advantages derived from its monopoly heritage. However, if the incumbent is able to offer customers a complete array of both local and interLATA services, it will acquire significant economic advantages if it can offer retail service to selected customers based upon its economic costs while competing carriers can only use much more costly special access services as inputs to their alternative offers.

Critically, the RBOCs' entry into the interexchange market is a voluntary choice, one that was based on a separate statutory condition that they would make access to their local facilities available to competitors on a nondiscriminatory basis at cost-based rates whenever a lack of access to such facilities would place competitors at a material competitive disadvantage. In order to attain a level playing field, requesting carriers must be able to obtain those functionalities at costs comparable to the incumbents. Otherwise,

the RBOCs will be able to benefit from the regulatory bargain that permitted them to enter the interexchange market without having to provide the very consideration that was the basis of that bargain. Accordingly, there is no legitimate reason to allow incumbents to continue to impose higher costs on competitors, especially in light of the delays imposed by the *Supplemental Order Clarification*. However, to the extent that the Commission allows incumbents to impose any restrictions on the use of UNE combinations to provide special access services (or equivalent functionality), the Commission should phase the limitations out over a relatively brief period, as set forth in subsections 6a and b of the proposed rule and explained below.

As shown in the December 23 ex parte and elsewhere, the harm resulting from use restrictions is magnified daily as incumbent LECs enter the interexchange market and are able to create price squeezes by offering competitive services at retail rates that allow them to benefit from their substantially lower unit costs. These competitive harms are further magnified as incumbents obtain pricing flexibility that enables them to offer customerspecific pricing for their retail services. However, to the extent that the Commission believes, as a matter of policy, it would be appropriate to allow use restrictions to remain available on facilities that are solely used to connect customers with long distance networks for a transition period, AT&T proposes that this should be accomplished over a period of no more than two years. Under such a phase-out plan, a carrier would be able to convert up to half of its preexisting special access arrangements which are not eligible for immediate conversion under other sections of the rule to UNE combinations at the end of one year and the remainder after two years. And in order to provide incumbents a reasonable time to adjust to the transition, the Commission could provide that the transition periods would begin to run as of the date the new rule becomes effective or when the incumbent obtains interexchange authority, whichever is later. This would prevent requesting carriers from converting all of their special access arrangements until at least 2005, giving incumbents more than adequate time to adjust to a competitive market.

Section 7 – Limitation on termination liabilities – The December 23 ex parte also described the increasingly draconian penalties that requesting carriers have faced since the Commission allowed incumbents to impose the interim restrictions on the use of UNE combinations to provide special access services. Allowing the incumbents to fully enforce such tariff and contractual liabilities would not only be unreasonable but would also effectively prevent requesting carriers from using UNEs to provide local services. Rather than force carriers to be subjected to the increasingly harsh termination liabilities in term and volume commitments that have been forced upon special access purchasers – especially since the imposition of the "safe harbor" provisions in the Supplemental Order Clarification<sup>13</sup> -- this section addresses the issue of what may be considered "appropriate"

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<sup>&</sup>lt;sup>13</sup> In this regard, AT&T's real-world experience attempting to negotiate special access volume plans with major incumbent LECs is instructive. In the summer of 1999, AT&T began extensive commercial negotiations with one of the major ILECs concerning the terms of a special access volume plan, including discounted pricing and service quality commitments. After the Commission's *UNE Remand Order* was adopted in the fall of 1999, indicating that requesting carriers would be generally free to convert special access services to UNEs except for "entrance facilities" to IXC points of presence, the ILEC offered AT&T significant discounts off of its then-prevailing special access prices, and responded positively to other AT&T negotiation requests. However, within days of November 24, 1999, when the *Supplemental Order* imposed the "significant local use" requirement on carriers' ability to convert special access services to UNEs, the ILEC forwarded a copy of the order to AT&T and withdrew its previous proposals in their entirety.

termination liabilities. First, section 7(a) would establish the simple equitable principle that, in calculating any contractual or tariffed termination liabilities, an incumbent LEC must count all UNEs and related functionalities that a requesting carrier *actually uses* in place of special access arrangements, either currently or prospectively. This is entirely "appropriate," since the carrier will *not* be abandoning those facilities (and will continue to order and pay for the use of facilities that provide equivalent functionality), the very reason why such liabilities are allowable in the first place. Thus, to the extent that requesting carriers actually use and pay for such facilities, whether now or in the future, they should receive credit for doing so.

Second, since the circumstances identified in sections 4 and 5 of the proposed rule primarily reflect a reasonable application of the *existing* principles relating to standalone or local usage of UNEs or cases where competitors are clearly competitively disadvantaged without access to network elements at TELRIC rates, there is no reason to allow the ILECs to continue to maintain the unfair bargaining leverage they acquired when the unadministrable safe harbors became effective nearly three years ago. Section 7(b) thus would prohibit an incumbent from assessing termination liabilities on the facilities converted to UNEs pursuant to those sections. Finally, section 7(b) and (c) collectively set the time at which all such liabilities would end, consistent with the schedule for eliminating the remaining use restrictions in section 6.15 Section 7(c) provides that half of a requesting carrier's termination liabilities would be eliminated for conversions that occur pursuant to sections 6(a) between one and two years after the incumbent is authorized to provide both local and long distance services in a state or the effective date of the rule, whichever is later. And the cross-reference to section 6(b) in Section 7(b) means that all remaining termination liabilities would be eliminated after two years. Thus, the ILECs would still retain significant protection from the impacts of special access conversions until at least 2005.

Section 8 – Operational and procedural requirements – Section 8 of the proposed rule establishes a number of provisions designed to prevent incumbents from adopting rules or practices that would effectively preclude requesting carriers from using UNEs and UNE combinations that they are otherwise entitled to use to provide competitive services. Thus, for example, these rules prohibit incumbents from adopting operational, procedural

<sup>&</sup>lt;sup>14</sup> In light of the draconian restrictions on requesting carriers' ability to order UNEs in lieu of special access services following the *Supplemental Order* and *Supplemental Order Clarification*, combined with the pricing flexibility that ILECs used to the hilt for the primary purpose of driving up special access prices, IXCs such as AT&T were given no choice but to accept increasing volume and term commitments that were demanded by the ILECs as a condition to limiting the impact of those price impacts on the IXCs and their customers. These commitments took into account future "growth" in new circuits that the IXCs should have been permitted to order as UNE combinations rather than as special access services.

<sup>&</sup>lt;sup>15</sup> Although section 6(b) is also referenced in section 7(b), the effects of conversions made pursuant to that section could not be implemented until all use restrictions are eliminated.

or ordering requirements that would impede carriers' ability to order or convert facilities to UNEs (subsection a). In particular, this rule requires incumbents to accept well-recognized access service requests (ASRs) to implement such conversions, as required by the Commission in the *Supplemental Order Clarification* (¶ 30). In addition, incumbents would be prohibited from making unauthorized physical modifications to preexisting facilities (subsection b); from unreasonably delaying in applying TELRIC rates to converted facilities (subsection c); from applying non-cost-based conversion charges (subsection d); from requiring more than carrier certification of any of the criteria necessary to comply with sections 4 or 5, which entitle requesting carriers to obtain access to UNEs (subsection e); and from providing discriminatory support for such facilities (subsections e and f).

In sum, as shown in the December 23 *ex parte*, AT&T believes that there is no reason to allow the incumbent LECs to continue to use the interim use and commingling restrictions to leverage their monopoly power over special access facilities, especially as they increase their entry into the interexchange market. Moreover, the record demonstrates that commingling restrictions not only serve no legitimate purpose, but they also impose inherently discriminatory and unreasonable costs and operational burdens on competitors that the incumbents do not face. And at a broader level, those provisions place a drag on the overall economy and deter investment in the Internet and deployment of related advanced services. Accordingly, the Commission should not allow incumbents to continue to impose such restrictions. However, to the extent that the Commission believes that there should be a transition applied to the elimination of use (but not commingling) restrictions with respect to facilities that are solely used to connect customers with long distance networks, AT&T believes that the transition reflected in the attached rule is more than sufficient to permit the incumbents to adjust to a competitive marketplace that rests on sound economic principles.

Consistent with Commission rules, I am filing one electronic copy of this notice and request that you place it in the record of the above-referenced proceedings.

Sincerely,

Joan Marsh

ce: William Maher
Jeff Carlisle
Michelle Carey
Brent Olson
Rich Lerner
Scott Bergmann
Thomas Navin
Jeremy Miller